

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**

**W. CLARKSON MCDOW, JR.,
UNITED STATES TRUSTEE
FOR REGION FOUR,**

Appellant,

v.

**DAVID D. DUDLEY &
ANN M. DUDLEY,**

Appellees.

Civil Action No.: 7:09-cv-00336-sgw

Bankruptcy Case No. 08-71561-RKR

STIPULATION FOR DISMISSAL OF APPEAL

W. Clarkson McDow, Jr., the United States Trustee for Region 4, appellant, and David D. Dudley and Ann M. Dudley, appellees, by counsel, hereby stipulate as follows:

1. On June 17, 2009, the United States Bankruptcy Court for the Western District of Virginia entered a memorandum order in bankruptcy case no. 08-71561 granting the appellees' (the debtors in the bankruptcy case) motion for summary judgment and dismissing the United States Trustee's motion to dismiss the appellee's bankruptcy case for abuse under the provisions of 11 U.S.C. § 707(b). The bankruptcy court concluded that Section 707(b)(1) of the Bankruptcy Code did not apply to cases converted to chapter 7 from chapter 13.

2. On June 26, 2009, the United States Trustee filed a timely notice of appeal of the Bankruptcy Court's order granting the appellee's motion for summary judgment.

3. On April 28, 2010, this Court entered a memorandum and order dismissing the United States Trustee's appeal because "a bankruptcy court's refusal to dismiss a

bankruptcy case as abusive or filed in bad faith is not a final judgment subject to appeal under 28 U.S.C. § 158(a)(1). (Docket Nos. 19 & 20).

4. On June 25, 2010, the United States Trustee filed a timely notice of appeal of this Court's April 28 order to the United States Court of Appeals for the Fourth Circuit.

5. On November 30, 2011, the Fourth Circuit Court of Appeals entered its Memorandum Opinion and judgment reversing this Court's April 28, 2010 order and remanding the case back to this Court for further proceedings. *McDow v. Dudley*, 662 F.3d 284, 290 (4th Cir. 2011). The Fourth Circuit's mandate under Fed. Rule. App. P. 41(a) issued on January 23, 2012.

6. The United States Trustee believes that if he pursued this appeal, he would ultimately prevail on the issue of whether Section 707(b)(1) applies to cases converted to chapter 7 from another chapter of the Bankruptcy Code. While bankruptcy courts have reached different conclusions regarding this issue, recently the Eighth Circuit Court of Appeals and the Bankruptcy Appellate Panel of the Eighth Circuit ruled in favor of the United States Trustee's position in this case. *Advanced Control Solutions, Inc. v. Justice*, 639 F.3d 838, 840 (8th Cir. 2011) (section 707(b)(1) applies with equal force to bankruptcy proceedings that commenced under Chapter 7 as with those converted from Chapter 13); *Fokkena v. Chapman (In re Chapman)*, 447 B.R. 250 (B.A.P. 8th Cir. 2011).

7. Nevertheless, over three years have passed since the debtors filed their bankruptcy case. The debtors have provided supplemental financial information to the United States Trustee that demonstrates a significant reduction in their income during the pendency of this appeal. Because of the change of circumstances, the United States Trustee no longer

seeks to pursue its motion to dismiss the appellee's case for abuse, and therefore wishes to dismiss this appeal.

8. The United States Trustee and the appellees therefore stipulate to the dismissal of the United States Trustee's appeal, with each party to bear their own costs, and respectfully request that the Court issue an order of dismissal, as set forth in the attached Exhibit A.

STIPULATED TO:

/s/ Joseph A. Guzinski
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*Counsel for the Appellees, David D.
Dudley & Ann M. Dudley*

Proposed Order of Dismissal
McDow v. Dudley, Civil Action No. 7:09-cv-00336-SGW

EXHIBIT A

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Appellees.

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AGREED ORDER DISMISSING APPEAL

Upon consideration of the Stipulation for Dismissal of Appeal between W. Clarkson McDow, Jr., appellant, and David and Ann Dudley, appellees, by each party's counsel, it is hereby

ORDERED that this appeal is dismissed, each party to bear their own costs.

ENTERED:

Samuel G. Wilson
Chief United States District Judge

[ENDORSEMENTS ON NEXT PAGE]

I ask for this:

/s/ Joseph A. Guzinski

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Seen and agreed:

/s/

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